No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL and OCEAN ADVOCATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal statutes, regulations and international treaty commitments of the United States that prescribe comprehensive standards for tank vessel operations, personnel qualifications and manning expressly or impliedly preempt attempts by an agency of the State of Washington to enforce regulations that impose different standards and requirements governing the same subject matters aboard the same tank vessels.

2. Whether an individual state may deny entry to, or penalize for non-compliance with state safety and environmental protection regulations, a vessel that has been found by the vessel's nation of registry and the United States Government to be eligible to enter the United States under multilateral treaty commitments, federal law, and federal regulations governing safety and environmental protection.

RULE 29.6 STATEMENT

The International Association of Independent Tanker Owners ("Intertanko"), is a trade association whose members are the owners or operators of tank vessels. Intertanko is organized as a non-profit entity under the laws of Norway. It issues no shares of ownership.

STATEMENT OF THE PARTIES

The United States of America sought intervenor status as a party Appellant in this case before the Court of Appeals for the Ninth Circuit. It was granted intervenor status on June 6, 1997. The United States is filing a separate Petition. Intertanko is serving the United States as a Respondent in this proceeding. All other parties are listed in the caption.

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(submitted as a separate volume)

OPINIONS BELOW

The order and amended opinion of the Court of Appeals, *International Ass'n of Independent Tanker Owners v. Locke*, Docket No. 97-35010, is reported at 148 F.3d 1053 (Pet. App. A.) The opinion of the district court granting summary judgment against petitioner Intertanko and denying Intertanko's motion for summary judgment, *International Ass'n of Independent Tanker Owners v. Lowry*, Docket No. C95-1096C, is reported at 947 F. Supp. 1484. (Pet. App. B.) The Order of the Court of Appeals denying rehearing and rehearing *en banc*, including the dissenting opinion of Judge Graber, is reported at 159 F.3d 1220. (Pet. App. C.)

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on June 18, 1998, and amended that order on August 31, 1998. (Pet. App. A.) Rehearing and suggestion for rehearing *en banc* were denied on November 24, 1998. (Pet. App. C.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).[1]

STATUTORY PROVISIONS INVOLVED

In 1995, the State of Washington's Office of Marine Safety ("OMS") promulgated as final rules Best Achievable Protection ("BAP") regulations governing tank vessel design, construction, operation, manning and personnel qualifications pursuant to Chapter 88.46 of the Laws of the State of Washington.[2] These regulations are published at §§ 317-21-010 *et seq.* of the Washington Administrative

1. The United States of America sought and received two extensions of time in which to file a petition for a writ of certiorari in this matter. In each instance, petitioner Intertanko filed conforming requests. On February 17, 1999, Justice O'Connor granted an extension of thirty days to and including March 24, 1999. On March 15, 1999, Justice O'Connor granted an extension to and including April 23, 1999.

2. Since the commencement of litigation in the United States District Court, the State of Washington has reorganized the Office of Marine Safety and placed its functions within the State's Department of Ecology.

Code ("WAC"). Federal regulations that impose differing standards on the same vessels are promulgated pursuant to Titles 33 and 46 of the United States Code. A table setting forth the coincidence between the subject matters of the challenged Washington State regulations and federal regulations, statutes and treaties is provided in the Appendix to this Petition. (Pet. App. K, 349a-353a.) The decisions of the courts below also place significant reliance on section 1018 of the Oil Pollution Act of 1990 ("OPA 90") (33 U.S.C. § 2718).

STATEMENT OF THE CASE

A. BACKGROUND

Intertanko asks the Court to review whether federal marine safety and environmental protection standards applicable to vessels operating in interstate and foreign commerce can be supplanted by differing standards imposed by the individual states. Because many of the regulatory requirements at issue derive from international treaty commitments of the United States, the issues for which Intertanko seeks review include the extent to which individual states may elect to depart from safety and environmental protection requirements and implementing mechanisms that enter U.S. law through accession by the federal government to international agreements.

Intertanko is an international trade association whose 280 members own or operate more than 2,000 tankers of U.S. and foreign registry. Some of these tankers call at ports in Washington State or transit through Washington State waters en route to destinations in other jurisdictions of the United States or Canada. The particular focus of this petition is a court of appeals decision from the Ninth Circuit that largely rejected assertions by Intertanko and intervenor below, the United States of America, that federal standards addressing tank vessel design, equipment, operations, personnel qualifications and manning preempt an agency of the State of Washington ("the State") from imposing regulations that propound divergent standards governing the same subject matters. Although the Court of Appeals correctly determined that federal law compelled a finding that the State's OMS had acted unlawfully in imposing design, equipment

and technology requirements on tankers operating in interstate and foreign commerce, the court left in place state regulations that it described generally as "operational" requirements, *i.e.*, matters such as navigation, personnel qualifications and management practices (including inspections, position plotting, manning of the bridge and engine room, event reporting, gyrocompass checks, drug and alcohol testing, work hour limits, language proficiency, and crew training). (Pet. App. A at 28a-32a.) Federal law addresses these subjects extensively in statutes, regulations, and international agreements to which the United States is a party.

B. FEDERAL REGULATION OF TANKER OPERATIONS

The current federal regulatory structure addressing tanker safety and marine environmental protection primarily rests on the Ports and Waterways Safety Act ("PWSA"), Pub. L. No. 92-340, 86 Stat. 424 (1972), as amended, a comprehensive body of marine safety and environmental protection regulations issued by the United States Coast Guard pursuant to delegation from the Secretary of Transportation ("Secretary"), and an extensive set of international maritime safety and environmental treaties. All of these federal sources of tank vessel regulation are "the supreme law of the land." U.S. Const. art. VI, cl. 2. Given the mobile and international nature of the maritime industry, this body of law depends on both national and international uniformity and coordination for its effective operation.

The PWSA contains two titles. Title I, located at 33 U.S.C. §§ 1221-1227, permissively authorized ("the Secretary may. . .") the Secretary to establish vessel traffic control systems, to restrict operation of tankers not having specified capabilities, and to negotiate international treaties on vessel safety. Title II of the PWSA employed mandatory language that required ("the Secretary shall . . .") the Secretary to adopt uniform federal regulations for tanker design, construction, equipment, and operation. 46 U.S.C. § 3703. The Secretary's obligations under this statute have been delegated to the United States Coast Guard. 46 U.S.C. § 2104. The distinction between the discretionary subject matters of Title I, subject matters not directly implicated in this litigation, and the mandatory requirements of Title

II, subject matters at the core of this case, was addressed by the Court in its 1978 decision, *Ray v. Atlantic Richfield Company*, 435 U.S. 151 (1978) (referred to herein either as "*Ray v. ARCO*" or "*Ray*").[3] In *Ray*, the Court assessed prior efforts by the State of Washington to assert regulatory jurisdiction over federal tank vessel regulation subject matters. The decision struck down all Washington State regulations then at issue that invaded Title II PWSA subject matters of design, construction, and equipment requirements. Importantly, the Court in *Ray* let stand only the State's tug escort requirements that were deemed within Title I PWSA discretionary subject matters:

> . . . the relevant inquiry *under Title I* with respect to the state's power to impose a tug escort rule is thus whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or decided that no such requirement should be imposed at all.

Ray, 435 U.S. at 171 (emphasis added). The Court further observed that "[i]t may be that rules will be forthcoming that will preempt the State's tug escort rule, but until that occurs, the state's requirement need not give way under the Supremacy Clause." 435 U.S. at 172.

Since *Ray*, the subject matters and breadth of tank vessel regulations and requirements mandated by Congress have expanded dramatically. In 1978, the PWSA was enlarged by the Port and Tanker Safety Act ("PTSA"), Pub. L. No. 95-474, 92 Stat. 1471 (1978) ("PWSA/PTSA"). The PTSA largely reissued the PWSA and stipulated further design, equipment, operations, personnel, manning, and training requirements for U.S. and foreign tankers operating in U.S. waters.

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3. The discretionary Title I, although authorizing the Secretary to establish minimum standards for structures in or adjacent to navigable waters, expressly preserved to the states authority to prescribe "higher" safety equipment requirements or standards for such structures (*e.g.*, bridges and piers). This Court in *Ray v. ARCO*, read this express grant of state authority with regard to structures as indicating an intent to preempt the states from prescribing more demanding requirements for vessels. *Ray v. ARCO*, 435 U.S. 151, 174 (1978).

In 1983, for the purpose of establishing one clear and concise scheme of marine safety laws, Congress enacted Subtitle II of Title 46, United States Code, ("Shipping"), Pub. L. No. 98-89, 97 Stat. 500 (1983), as amended. This codification included existing provisions of Title II of PWSA. Title 46 is a detailed and expansive statute governing marine safety and environmental protection. Under Title 46, the Secretary is accorded broad powers of superintendence over the Merchant Marine and is authorized to prescribe regulations to carry out the provisions of the law. 46 U.S.C. § 2103.[4] Congress has enacted various other amendments to Title 46, the most recent in 1998.

The process of enlarging the extent and complexity of Title 46 continued in 1990 when Congress enacted additional changes to Title 46 in the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990). Title IV of OPA 90 ("Prevention and Removal") expanded yet again the already substantial federal presence in the field of tank vessel design, construction, personnel, equipment and operations with explicit mandates to the Secretary ("the Secretary shall . . .") to promulgate new marine safety and environmental regulations.[5] An additional expressed purpose of OPA 90 was to create uniform federal oil pollution liability law. Prior to 1990, four different federal statutes addressed such requirements. These were: the Deepwater Ports Act;

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4. The discretionary elements of Title I of PWSA remain uncodified and are placed in Title 33 of the United States Code ("Navigable Waters").

5. Title IV OPA 90 amendments include: mandatory review of alcohol and drug abuse and other matters in issuing licenses and merchant mariners' documents (§ 4101); renewal periods for licenses and documents (§ 4102); suspension and revocation of licenses and documents for alcohol and drug abuse (§ 4103); manning standards for foreign tank vessels (§ 4106); vessel traffic systems (§ 4107); periodic gauging of plating thickness of tankers (§ 4109); overfill and tank level or pressure monitoring devices (§ 4110); study of tanker navigation safety standards (§ 4111); tank vessel manning (§ 4114); double hull construction for tank vessels (§ 4115); and pilotage criteria (§ 4116). Elements of OPA dealing with liability and compensation were placed in Title 33, while provisions addressing vessel design, operation, equipping, personnel qualification and manning specifically amended Title 46. (Pet. App. F at 222a-261a.)

the Outer Continental Shelf Land Act; the Trans-Alaska Pipeline Authorization Act; and the Federal Water Pollution Control Act. Each of these four laws contained express language permitting states to impose their own liability or other requirements related to the discharge of oil into their waters. OPA 90 consolidated these various pre-existing authorities and preserved the flexibility that the States and their subsidiaries had been permitted under earlier law. Under Title I of OPA ("Oil Pollution Liability and Compensation") Congress carried forward pre-existing savings language from these other statutes and made clear its non-preemptive intent "in this chapter [OPA 90]", the Solid Waste Disposal Act, or section 9509 of the Internal Revenue Code not to affect

> the authority of the United States or any State or political subdivision thereof (1) to impose additional liability or additional requirements . . . relating to the discharge or substantial threat of a discharge, of oil.

33 U.S.C. § 2718(c). The decision of the Court of Appeals was based in significant part on its perception that this savings provision of OPA provided compelling evidence of a Congressional determination to permit state action in vessel operations, personnel qualifications, manning and training subject matters.

Broad authority is imparted to the Secretary to regulate tankers under Chapter 37 of Title 46, which addresses carriage of dangerous liquid bulk cargoes, including oil, by commercial vessels. Section 3703(a) states emphatically that the Secretary

> *shall* prescribe regulations for the design, construction, alteration, repair, maintenance, *operation*, equipping, *personnel qualification*, and *manning* of vessels to which this chapter applies, that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment.

46 U.S.C. § 3703(a) (emphasis added). The italicized subject matters directly correspond to the subject matters of the remaining State of Washington tank vessel regulations. Chapter 37 further requires the establishment of minimum standards for self-propelled tankers (46 U.S.C. § 3708), and requires foreign vessels to show evidence of compliance with Chapter 37 and regulations prescribed thereunder (46 U.S.C. § 3711). Other pertinent provisions of Title 46 include: (1) Part D, which requires the Secretary to establish procedures for reporting and investigating marine casualties; (2) Part E, which governs personnel licensing and qualifications; and (3) Part F, which gives the Secretary control over vessel manning.

Section 9101 of Title 46 establishes standards for foreign tank vessels, and directs that the "Secretary shall evaluate the manning, training, qualification, and watchkeeping standards of a foreign country that issues documentation for any vessel to which chapter 37" of Title 46 applies. If the Secretary determines that a country has failed to maintain or to enforce standards at least equivalent to those required by United States law or international standards accepted by the United States, the Secretary may prohibit vessels issued documentation by that country from entering the United States. 46 U.S.C. § 9101.

Title 46 expressly authorizes the states to regulate marine affairs only for limited purposes: recreational vessel casualty reporting (46 U.S.C. § 6102), piloting (46 U.S.C. § 8501), recreational vessel titling and registration (46 U.S.C. chs. 122 and 125), and recreational boating safety (46 U.S.C. ch. 131). No other state action in marine safety and environmental protection is expressly authorized by Title 46.

In addition to these statutes, there exists a vast network of federal regulations implementing both federal statutes and international treaty requirements. Many of these regulations governing federal subject matters of design, construction, operations, personnel qualifications and training, manning and management practices contain express preemptive statements declaring a federal judgment that state action is precluded. Examples of these preemptive statements by the United States Coast Guard have been included in the appendix to this Petition.

(Pet. App. H, 269a-289a.) Intertanko relied below, and continues to rely here, on these express preemptive statements as compelling indication that state action is barred in these federal subject matters.

C. INTERNATIONAL AGREEMENTS REGULATING TANKER OPERATIONS

A unique feature of federal law governing marine safety and environmental protection is its close integration with comprehensive vessel standards established through international agreements with other maritime nations. Since the loss of the *Titanic* in 1912, and particularly since the 1970s, the United States and other leading maritime nations have promoted the establishment of internationally accepted uniform marine safety and marine environmental protection standards. These international commitments, once agreed to by the federal government, are taken into the corpus of federal statutes and regulations by operation of Article VI of the Constitution and by the practical necessity of conforming U.S. requirements and procedures to those committed to in international agreements. Titles 33 and 46, for example, contain several provisions concerning international marine safety and environmental protection requirements and the necessity of implementing those standards in an atmosphere of international comity and reciprocity.[6]

Intertanko substantially relies on four international agreements that affect the Court's review of this case: The International Convention for the Safety of Life at Sea, 1974 ("SOLAS") and its amendments, the bedrock international agreement regarding maritime

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6. *See, e.g.*, 46 U.S.C. § 3303(a) ("A foreign country is considered to have inspection laws and standards similar to those of the United States when it is a party to an International Convention for Safety of Life at Sea to which the United States is currently a party"); 46 U.S.C. § 3711 ("The Secretary may accept any part of a certificate, endorsement, or document issued by the government of a foreign country under a treaty, convention, or other international agreement to which the United States is a party, as a basis for issuing a [U.S.] certificate of compliance").

safety (Pet. App. I at 293a);[7] the International Convention for the Prevention of Pollution from Ships, 1973, and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships ("MARPOL 73/78"), which set international standards to prevent pollution from ships in the marine environment (including Annex I of MARPOL 73/78, which regulates tankers) (Pet. App. I at 296a);[8] the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, 1978 ("STCW"), and its 1995 Amendments, which set international standards regarding the operation of vessels, training and qualifications of seamen (Pet. App. I at 290a);[9] and the Convention on the International Regulation for Preventing Collisions at Sea, 1972 ("COLREGS"), which provides mandatory rules for ships underway as well as standardized light and sound requirements for vessels. (Pet. App. I at 306a.)[10] Each of these conventions has been signed, ratified, executed and implemented by this country in accordance with the requirements of the particular convention and the Constitution of the United States. U.S. Const. art. II, § 2, cl. 2. Each of these agreements is, by operation of Article VI of the Constitution, the "supreme law of the land." In addition to these four agreements, elements of the United Nations Convention on the Law of the Sea ("UNCLOS")[11] and the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region ("U.S./Canada Bilateral")[12] are

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7. 32 U.S.T. 47, T.I.A.S. No. 9700.

8. 17 I.L.M. 546.

9. S. Treaty Doc. No. 96-1, C.T.I.A. No. 7624.

10. T.I.A.S. No. 8587, *reprinted in* 12 I.L.M. 734 (1973).

11. *Reprinted in* 21 I.L.M. 1261 (1982). In 1982 President Reagan, while acknowledging that the provisions of this agreement reflected established customary international law and thus would be followed by the United States, opposed U.S. accession to this agreement because of its elements governing deep seabed mining. *See* 18 Weekly Comp. Pres. Docs. 887 (1982).

12. 32 U.S.T. 377, T.I.A.S. No. 9706.

relevant to the preemption analysis that must be undertaken in reviewing the Court of Appeals' decision.

Under these international conventions, the national government of the United States undertook or has acknowledged certain obligations. These obligations include implementing and enforcing the conventions on both U.S. vessels and foreign vessels in U.S. ports. Treaty obligations *require* the United States to accept certifications by other signatory states that their vessels and crews comply with international safety law.[13] Moreover, federal statutes specify reciprocity for foreign certificates. *See* 46 U.S.C. § 3303(a) and 33 U.S.C. § 1903(b).

D. THE STATE OF WASHINGTON'S TANKER REGULATIONS

Against this comprehensive array of federal and international standards stand the Washington State Regulations that provoked this litigation. The regulations were issued pursuant to Chapter 88.46 of the Revised Code of Washington. This statute (R.C.W. §§ 88.46.010, *et seq.*) was enacted by the Washington State Legislature and became effective on July 1, 1991. The statute contains various provisions requiring owners and operators of tank vessels to file oil spill prevention and response plans with OMS. Failure to file acceptable plans subjects violators to statutory penalties and a prohibition on calling at Washington ports. R.C.W. §§ 88.46.070; 88.46.080; 88.46.090.

R.C.W. § 88.46.040(3), provides that the State's Office of Marine Safety "shall only approve a prevention plan if it provides the best achievable protection from damages caused by the discharge of oil into the waters of the state. . . ." (Pet. App. J at 347-48a.) Pursuant to R.C.W. §§ 88.46.010(2) and 88.46.010(3), OMS is to define the term "Best Achievable Protection" by regulation. Section 88.46.040(1) provides that "the office [OMS], by rule, shall establish standards for

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13. SOLAS, Chap. I, Regulation 17 (Pet. App. I at 293a); MARPOL 73/78, Article 5 (Pet. App. I at 296a); STCW, Article X. (Pet. App. I at 290a).

spill prevention plans." (Pet. App. J at 346a.) These requirements are applicable to *all* vessels not just tank vessels. The State of Washington has taken the position that the application of these regulations extends to tankers merely transiting Washington State waters, including vessels en route to ports in Oregon or Canada.

The current "best achievable protection" standards were adopted by OMS, promulgated as binding rules as part of WAC § 317-21 and became effective in July 1995. Under WAC § 317-21-500, an owner or operator of a tank vessel who fails to comply with the regulations is subject to the following administrative actions: (1) plan disapproval; (2) restriction of the tank vessel's movements or operations in state waters, or both; (3) assessment of civil penalties under R.C.W. § 88.46.090; (4) referral for prosecution under R.C.W. § 88.46.080; or (5) denial of entry into state waters.

The BAP Regulations imposed detailed restrictions on the manning, training, operation and safety and equipage of oil tankers in Washington waters. These restrictions and requirements are accurately summarized in Part I of the Court of Appeals decision. (Pet. App. A at 10a-13a.) The BAP Regulations require, among other things, safety-related event reporting; security rounds and position plotting while at anchor; engine room and engine control room staffing; vessel position recording every 15 minutes while underway; comprehensive voyage planning; frequent navigation checks of the tanker's gyrocompass; hourly steering gear room inspections; pre-arrival tests and inspections; emergency operating procedures; state access to navigation records; comprehensive training programs, position-specific training, refresher training, and shipboard drills; random, pre-employment, probable cause and post-accident drug and alcohol testing; personnel performance reviews; work hour limits; a common language for crew members; training and work hour records maintenance; a "Safety and Environmental Protection Management System"; quarterly vessel visitation program; preventive maintenance program; a critical area inspection program; and advance notice of vessel entry and safety reports. (Pet. App. J, 307a-345a.)

Each of the State of Washington requirements coincides directly with the subject matters and purposes of federal regulations, statutory requirements and international undertakings of the United States. This coincidence of subject matters, purpose and content is extensive and is the foundation of Intertanko's contention that conditions of explicit and implied federal preemption act to invalidate the state agency's regulations under Supremacy Clause principles.[14] (Pet. App. K, 349a-353a.)

E. PROCEDURAL HISTORY

On July 17, 1995, Intertanko filed a complaint seeking injunctive and declaratory relief in the United States District Court for the Western District of Washington ("district court"). Intertanko argued that the BAP regulations are preempted by federal law and international treaties and, therefore, pursuant to the Supremacy Clause, the Commerce Clause and federal powers in the domain of foreign affairs, they should be declared void. Additionally, Intertanko argued that the BAP regulations created constitutionally impermissible conflicts with international obligations of the United States. Intertanko cited express statements by the United States Coast Guard as evidence of federal preemptive intent and urged the district court to find both express and implied preemption by federal authority as a basis for invalidating the OMS regulations. Finally, Intertanko contended that, because the State regulations necessarily required shipowners, crews and vessels outside the State of Washington and the United States to comply with their requirements in order to qualify for eventual admission to Washington waters, they resulted in an impermissible extraterritorial application of State power.

Ruling on cross motions for summary judgment, the district court (Coughenour, J.) concluded that all challenged state regulations were constitutionally valid, that no condition of field preemption existed with respect to any of the regulations, that the BAP regulations did

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14. The Chart attached as Appendix K compares the federal statutes, regulations and international maritime obligations of the United States with all the BAP regulations to illustrate the relationship and overlap between the components of the federal system and each of the BAP regulations.

not violate the Commerce Clause or impinge on the foreign affairs powers of the national government, and were not improper extraterritorial projections of state powers. The district court also concluded that express preemptive statements of the United States Coast Guard regulations were beyond the statutory authority of the Coast Guard. (Pet. App. B at 61a-63a.)

Intertanko filed a Notice of Appeal from the district court's decision. The United States of America intervened in general support of Intertanko's position that certain of the BAP regulations were incompatible with federal requirements and international commitments.[15] After hearing oral argument, the Court of Appeals issued an Order on June 18, 1998, affirming in part and reversing in part. An amended opinion issued on August 31, 1998. The Court of Appeals found that WAC § 317-21-265, requiring certain radar and global positioning system ("GPS") receivers and specialized towing equipment was "virtually indistinguishable" from a similar regulation invalidated by this Court in *Ray*, 435 U.S. at 160-61, and, therefore, was preempted by PWSA. (Pet. App. A at 30a-31a.) With regard to the remainder of the state regulations, however, the Court of Appeals held that the BAP regulations were not preempted either by this Court's analysis in *Ray*, or by regulations implemented by the Coast Guard.

The Court of Appeals commenced its analysis by weighing the non-preemptive effect of section 1018 of OPA 90 (33 U.S.C. § 2718). Concluding that section 1018 had non-preemptive effect for the entirety of OPA 90, the court nonetheless considered whether section 1018 could have impact beyond OPA 90 to the sources of preemption advanced by Intertanko — specifically, the PWSA and federal regulations that coincided with the subject matters of the State's BAP

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15. Although agreeing with Intertanko that certain of the challenged state regulations were preempted, the United States also posited that some might not be and urged the Court of Appeals to reverse the district court's grant of summary judgment to the State and return the matter to the district court for additional proceedings with instructions on the correct application of preemption principles to the facts of the case. (Rec., Brief for Intervenor United States at 55-56.)

standards. The court concluded that OPA 90, "as the most recent statute in the field," and its section 1018 savings provision reflect " 'the *full* purposes and objectives of Congress' better than the PWSA, the PTSA, or the Tank Vessel Act, all of which OPA 90 was designed to complement." (Pet. App. A at 21a.) The court further stated that section 1018 "demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability, and compensation." (Pet. App. A at 22a.) Intertanko's arguments concerning incompatibility with international agreements were dismissed by reason of the Circuit's 1984 conclusion in *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 493-94 (9th Cir. 1984), *cert. denied sub nom. Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985) ("*Chevron*" or "*Chevron v. Hammond*"), that

> "international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction."

(Pet. App. A at 23a.) The court declined to consider arguments advanced by the United States that the State regulations further conflicted impermissibly with "innocent passage" elements of UNCLOS and the U.S./Canada Bilateral Agreement on the grounds that these issues were being raised for the first time on appeal. (Pet. App. A at 24a-25a.) Again relying on the section 1018 OPA 90 savings provision, the court determined that express preemptive statements by the Coast Guard in issuing regulations under PWSA and other federal statutes rendered such statements beyond the "scope of [the Coast Guard's] congressionally delegated authority," citing to this Court's decision in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986). (Pet. App. A at 33a-34a.) Finally, the strong reliance of Intertanko and the United States on the rationale of *Ray* as compelling a field preemption conclusion was rejected on the basis that *Ray*'s determination that Washington State design, construction and equipment requirements were incompatible with Title II PWSA subject matters was limited to those particular subject matters and did not extend to other elements (*e.g.*, operations, personnel qualifications and training, and manning) of Title II PWSA. (Pet.

App. A at 27a-28a, and n.11.) The court cited *Chevron v. Hammond* as support for restricting its reading of *Ray* as confined to design and construction elements of PWSA. (Pet. App. A at 28a-29a.)

Intertanko and the United States petitioned for rehearing and rehearing *en banc*. The Court of Appeals issued its order denying Intertanko's request on November 24, 1998. (Pet. App. C, Graber, J., dissenting).

REASONS FOR GRANTING THE WRIT

The decision below presents immediate issues of transcendent importance to the authority of the national government to regulate maritime commerce and to bind the entirety of the United States to international commitments concerning marine safety and environmental protection. The Court of Appeals decision is contrary to Congressional intent, the express preemptive statements of the federal government, the reasoning of this Court, and solemn international commitments of the United States. The decision cannot be coherently reconciled with this Court's rationale in *Ray v. Arco* or with the general line of precedents in this Court and the lower federal courts. With the qualified and distinguishable exception of *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied sub nom. Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985) ("*Chevron v. Hammond*" or "*Chevron*"), all previous federal cases permitting some degree of state activity in maritime-related areas either have addressed or have purported to address ancillary, "secondary" or "off-the-ship" aspects of maritime activity or have been based explicitly on the absence of a direct federal presence in the subject matters of the state regulation.[16] The Court of Appeals decision grants

16. *See, e.g., American Dredging Co. v. Miller*, 510 U.S. 443, 450-53 (1994) (no federal preemption of state law of *forum non conveniens*); *Ray v. Atlantic Richfield*, 435 U.S. 151, 171-73 (1978) (federal preemption of all state regulations addressing vessel design, construction and equipment requirements, but declining to find preemption where Secretary had not yet acted on the federal level); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341-43 (1973) (permitting State of Florida statute imposing strict liability for oil spills); *Huron Portland Cement Co. v. Detroit*, 362 U.S.

(Cont'd)

Washington, and, by extension, other maritime jurisdictions within the Ninth Circuit, license to substitute state requirements for the federal and international standards that govern these subject matters in the rest of the United States. Here there is no question that the subject matters regulated by the State impinge directly on subject matters addressed by federal statutes, regulations, and treaties to which the United States is a party. The matter has precipitated diplomatic protest[17] and has occasioned substantial scholarly comment, the

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(Cont'd)
440, 443-45 (1960) (federal licensing of vessels did not preempt municipal enforcement of local smoke abatement ordinance when vessels are moored or anchored within City); *Barber v. Hawaii*, 42 F.3d 1185, 1194, 1197 (9th Cir. 1994) (state anchorage and mooring regulations for local vessels not preempted); *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 629 (1st Cir. 1994) (validating state law on remedies for oil pollution damage under OPA); *Beveridge v. Lewis*, 939 F.2d 859, 864 (9th Cir. 1991) (no federal preemption exists regarding municipal ordinance prohibiting mooring and anchorage of pleasure vessels where Secretary had not issued federal regulations); *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1427 (9th Cir. 1990) (no preemption of California overtime pay laws where employees involved worked exclusively in state coastal waters on vessels not engaged in foreign, intercoastal or coastwide voyages); and *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied sub nom. Chevron U.S.A. Inc. v. Sheffield*, 471 U.S. 1140 (1985) (upholding Alaska statute prohibiting oil tankers from discharging ballast stored in oil cargo tanks in state waters). As noted elsewhere in this petition, the *Chevron* decision was relied upon by the Court of Appeals as Ninth Circuit authority for the proposition that international agreements addressing ballast discharges prescribe only minimum standards which states may exceed. Although *Chevron* stands out from the other cases cited in this note because the Ninth Circuit upheld valid state regulation of vessel ballast disposal, the case was consciously not decided under PWSA, but instead was based on the pollutant discharge permit issuance requirements of the federal Clean Water Act, a statute not contended by any party to be implicated here.

17. *See, e.g.*, Note Verbale from the diplomatic representatives of Belgium, Denmark, Finland, France, Germany, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Spain, Sweden and the Commission of the European Community to the Department of State. (Pet. App. L at 355a-56a.) Additionally, the United States in its brief to the Ninth Circuit noted that the
(Cont'd)

weight of which is critical of the reasoning and conclusions of the district court and the Court of Appeals.[18]

The Court of Appeals' substantial reliance on a savings provision of OPA 90 (section 1018), a provision not previously examined by this Court, raises important questions of federal law that have not been, but should be, settled by this

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Government of Canada also has protested the application of the State's local regulations to international traffic moving through the Strait of Juan de Fuca and Puget Sound en route to Canadian waters as violative of The Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (T.I.A.S. 9706, 32 U.S.T. 377). (*See* Rec., Brief for Intervenor United States at 13.)

18. *See* Craig H. Allen, *Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States* (Parts I-III), 29 J. Mar. L. & Com. 335 (1998), 29 J. Mar. L. & Com. 565 (1998), 30 J. Mar. L. & Com. 85 (1999); Sarah A. Loble, *Intertanko v. Lowry: An Assessment of Concurrent State and Federal Regulation Over State Waters*, 10 U.S.F. Mar. L.J. 27, 72 (1997); Charles L. Coleman, III, *Federal Preemption of State "BAP" Laws: Repelling State Borders in the Interest of Uniformity*, 9 U.S.F. Mar. L.J. 305, 356 (1997); Robert E. Falvey, *A Shot Across the Bow: Rhode Island's Oil Spill Pollution Prevention and Control Act*, 2 Roger Williams U.L. Rev. 363, 396 (1997); Matthew P. Harrington, *Necessary and Proper, but Still Unconstitutional: The Oil Pollution Act's Delegation of Admiralty Power to the States*, 48 Case W. Res. L. Rev. 1, 17 n.59 (1997); *but see* Michael P. Mullahy, *States' Rights and the Oil Pollution Act of 1990: A Sea of Confusion?*, 25 Hofstra L. Rev. 607, 636-37 (1996); Laurie L. Crick, *The Washington State BAP Standards: Case Study in Aggressive Tanker Regulation*, 27 J. Mar. L. & Com. 641, 646 (1996); and Marva Jo Wyatt, *Navigating the Limits of State Spill Regulations: How Far Can They Go?*, 8 U.S.F. Mar. L.J. 1, 26 (1995). With the exception of the more recent work by Professor Allen of the University of Washington, all of these articles were cited by Judge Graber in her dissenting opinion declaring "[t]he preemptive effect of OPA 90 [ ] an issue of exceptional importance." (Pet. App. C at 76a-77a, and n.1.)

Court.[19] Until the matter is settled clearly, there are substantial doubts as to whether the previously exclusive federal powers over vessel operations can henceforth have any substantive meaning or effect in the Ninth Circuit. Beyond the boundaries of the Ninth Circuit, other states also have considered the enactment of state requirements that diverge from federal standards.[20]

The Court has twice previously examined efforts by the State of Washington to insert itself into the traditionally federal domain of vessel safety and operations. In both cases it allowed the State but limited access. In *Kelly v. Washington*, 302 U.S. 1 (1937), the Court,

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19. A more indirect, but potentially damaging element of the decision that merits review by this Court is its dramatic resuscitation of *Chevron v. Hammond*, a case long limited in its practical effect because of modern tanker designs and operational procedures, into a distorting prism of *Ray* and a device for minimizing the force of treaty commitments. Although the Court in 1985 declined to issue a writ of certiorari to the Circuit to review *Chevron*, the exchange recorded between Justice Stevens and Justice White at 471 U.S. 1141 - 1143 suggests that the instant case properly elevates a ripened *Chevron*, its negative implications for federal authority no longer dormant or minimal, to at least indirect attention by the Court. *Chevron*'s facts enabled the Court of Appeals in 1984 to shift analysis away from the strong preemptive atmosphere of Title II PWSA and *Ray*, to a more flexible "shared" or cooperative federal/state responsibility regime found in the Clean Water Act. *Chevron*, 726 F.2d at 495-501. *Ray* recognizes this distinction in discussing the CWA's predecessor: "While those statutes contemplate cooperative state-federal regulatory efforts, they expressly state that intent, in contrast to PWSA." *Ray v. ARCO*, 435 U.S. 151, 178, n.28. Having been positioned originally as a non-PWSA case, *Chevron* returns forcefully in the matter at bar as the Court of Appeals' template for interpreting *Ray* and the preemptive effect of PWSA. Intertanko submits that this use of *Chevron* in the instant case, and its direct restrictive effects on the interpretation of *Ray*'s view of PWSA, are additional reasons that this Court should now exercise its discretion to issue a writ of certiorari to the Ninth Circuit.

20. *See* Falvey, *A Shot Across the Bow*, *supra*, note 18 for a description of recent Rhode Island enactments imposing vessel requirements in that state. The State of Maine also is considering the issuance of vessel operational regulations for tankers entering that State's waters.

although providing some latitude to State regulation of certain motor-driven tugboats where no federal statute was applicable and where federally regulated vessels were expressly excluded, noted that there existed a:

> class of regulations which Congress alone can provide. For example, Congress may establish standards and designs for the *structure and equipment of vessels, and may prescribe rules for their operation*, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another and so on. . . .

302 U.S at 14-15 (emphasis added).[21]

The second instance of Supreme Court review of Washington State marine regulations was the *Ray v. ARCO* litigation. 435 U.S. 151 (1978). In that decision, the Court struck down all challenged Washington State regulations that trespassed on mandatory subject matters regulated by Title II of the PWSA (vessel design, construction and equipment), but let stand tug escort requirements that were considered covered by the permissive regulation provisions of Title I, PWSA. The state tug escort requirements in *Ray*, like the motor vessel inspection requirements of *Kelly*, had been issued in an area

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21. The Court, through Chief Justice Hughes, further observed that, although the absence of federal inspection regulation for the class of vessels covered by the challenged state standards spared the provision from invalidation, if the State had attempted "to impose particular standards as to structure, design, equipment and operation" the State would "encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule." 302 U.S. at 15.

where the federal government had neither acted nor determined that action was unnecessary.[22]

Thus, until the issuance of the decisions by the district court and Court of Appeals in this case, one reasonably could rely on *Ray* and could consider the law well settled that the preeminent and extensive federal role in regulation of interstate and foreign commerce vessel activities constrained permissible state and local action to those subject matters in which Congress had left the Secretary of Transportation discretion and that discretion had not been exercised. The scope and technical complexity of federal marine safety and environmental protection regulation have expanded immensely in the two decades since *Ray*. This vast expansion of the federal presence in the on-board subject matters of operations, personnel qualifications and manning, enhances the value of *Ray*'s observation that: "The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment." 435 U.S. at 165. The State of Washington is now asserting a "contrary state judgment" with regard to tank vessel operations, personnel qualifications and manning and has done so with the approval of the Court of Appeals.[23] Defining with precision the limits of permissible state incursions presents an important question of federal law that should be settled by this Court.

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22. *See Ray*, 435 U.S. at 171-72. The Court found that to permit states to act where Congress intended a "uniform federal regime" and "uniform, international standards" would violate the Supremacy Clause and frustrate congressional intent. *Id.* at 165-68. The Court also reviewed Title I provisions and found that, where the Secretary had not yet acted, "the State's requirement need not give way under the Supremacy Clause." *Id.* at 168-72. The Court did not rule out the possibility that when the Secretary *did* issue regulations, that they "will preempt the State's present tug-escort rule." *Id.* at 172.

23. *See supra* note 6 and accompanying text indicating the views of Congress that foreign vessels are to be accorded reciprocal treatment and that the United States, by federal law and treaty obligation, accepts documentation of foreign vessels as a basis for granting certificates that permit entry into U.S. waters.

In *Ray*, the Court distinguished previous cases in which some degree of state intrusion into maritime subject matters had been permitted by noting that:

> in none of the relevant cases sustaining the application of state laws to federally licensed or inspected vessels did the federal licensing or inspection procedure implement a substantive rule of federal law addressed to the object also sought to be addressed by the challenged state regulations.

Ray v. ARCO, 435 U.S. at 164.

In this matter, as in *Ray*, the State regulations are precisely coincident with subject matters and objectives of federal requirements. The divide between state and federal objectives that was found, for example, in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (municipal smoke abatement rather than marine safety) and that was claimed to have existed in the Ninth Circuit's reasoning in *Chevron v. Hammond* (pollutant discharges under the shared federalism regime of the Clean Water Act, rather than vessel safety and environmental protection under the PWSA) simply does not exist here. In this matter, as in *Ray*, the State's vessel regulations are precisely coincident with the subject matters and objectives of the federal requirements.

The Court of Appeals' primary rationale for its historic decision hinges substantially on two subsections of a savings provisions in OPA 90.[24] Sections 1018(a) and (c) (33 U.S.C. § 2718(a) and (c)), as employed by the Court of Appeals, defeat express preemptive

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24. Section 1018 is lodged in Title I, "Oil Pollution Liability and Compensation." As observed by Judge Graber in her dissent from the Court of Appeals' denial of *en banc* rehearing, (Pet. App. C at 81a-82a), there are other non-preemptive or savings provisions attached to other titles of OPA. *See, e.g.*, §§ 4202(c), 5002(n) and 8202(c). In addition to these provisions, there is in Title VI of OPA ("Miscellaneous"), yet another OPA 90 "savings provision," that provides that "this Act does not affect admiralty and maritime law." OPA 90 § 6001. (Pet. App. F at 262a-263a.)

statements of the Coast Guard and describe a general non-preemptive atmosphere that was deemed to pervade all elements of OPA 90 and the PWSA as well. (Pet. App. A at 21a-22a.):

> Section 1018 of OPA 90 sheds considerable light upon the purposes and objectives of Congress in effectuating a federal scheme of tanker regulation. That provision demonstrates Congress's willingness to permit state efforts in the areas of oil-spill prevention, removal, liability, and compensation."

(Pet. App. A at 21a-22a.) Section 1018 also was found, because of its relatively recent enactment, to reflect, "better than the PWSA, the PTSA or the Tank Vessel Act" the full purposes and objectives of Congress for conflict preemption analysis purposes. (Pet. App. A at 21a.)

If the Court grants review of the Court of Appeals decision, the starting point must be the question of whether the Court of Appeals has grossly over-empowered this facially modest OPA 90 provision. Intertanko contends that the State regulations are preempted under express, implied, and conflict preemption principles. The most direct elements of preemption asserted were numerous express preemptive utterances by the United States Coast Guard that accompanied the issuance of regulations mandated by Congress. (Pet. App. H, 269a-289a.) These preemptive statements address manning, navigational safety, drug and alcohol testing, bridge resource management, and vessel safety requirements. The preemptive federalism statements are variously worded, but none are ambiguous. All of them post-date OPA 90 and section 1018. An example of this type of statement is the Coast Guard's 1995 statement on vessel safety requirements:

> The authority to regulate safety requirements of U.S. vessels is committed to the Coast Guard by statute. Furthermore, since these vessels tend to move from port to port in the national market place, these safety requirements need to be national in scope and avoid numerous, unreasonable and burdensome variances.

> Therefore, this action would preempt State action addressing the same matter.

(Pet. App. H at 285a; *see also* Pet. App. H, 276a-281a.)

This Court has recognized that a federal agency, acting through its rulemaking processes, can effect preemption of state law. *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). The Court also has recognized that the act of Congress in entrusting an agency, in this case the Coast Guard, with the administration of a complex and comprehensive regulatory regime is evidence in itself of preemption. *San Diego Building Trades Counsel v. Garmon*, 359 U.S. 236, 242 (1959). An agency's view of the preemptive import of statutes that it administers is valuable to reviewing courts in determining whether state action is ousted. *Farmers Educational & Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959).

The Congress not only permits the Coast Guard to act in the subject matters of the challenged State regulations, it *insists* on such action. The Coast Guard has no discretion, at least to the extent it issues regulations on "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels. . . ." (46 U.S.C. § 3703(a)). This Court has advised that "statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). If, as Intertanko contends, the Court of Appeals misread OPA 90's section 1018 savings provision to reflect a general intent to subject all elements (other than design, equipment, and construction) of the federal marine safety and environmental protection programs to state action, these preemptive statements by the Coast Guard are entitled to force and effect and dispense with the need for further preemption inquiry where State regulations overlap.

The Court of Appeals' reliance on section 1018 as a broad source of divestiture of federal powers presents a confusing confluence of two quite separate federal programs that, prior to this litigation, had managed to stand apart. The first of these elements is the mandatory

and dominant role of the United States national government in vessel regulation. Within this domain (the boundaries of which are generally coincident with Title 46), the only allowances for state activity have been clearly stated and finite. They are, as has been noted above, certain pilotage activities (46 U.S.C. § 8501), recreational vessel safety and registration (46 U.S.C. chs. 122, 125 and 131), and, in another context, regulation of structures (33 U.S.C. § 1225), a derogation from federal control that this Court found indicative of an intent not to permit state activity with regard to the subject matters at issue in *Ray*. *See Ray*, 435 U.S. at 171-174; and *supra* text accompanying note 3.

The second federal statutory line, which the Court of Appeals here allowed to frustrate the first, is in the area of liability, compensation and penalties for oil spills, areas in which state action has long been tolerated by express authorization in federal statutes. Federal statutes have expressly preserved to the states the authority to address the economic damages and removal issues that attend the release of oil from a variety of sources, including vessels, into aquatic environments. The Clean Water Act ("CWA") (33 U.S.C. §§ 1251-1356) regulates discharges of a number of substances, including oil, into navigable and non-navigable waters within the United States. It contained a provision virtually identical to section 1018 of the Oil Pollution Act. That provision, section 1321(o)(2), stated that

> nothing in this section shall be construed as preempting any state or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such state.

33 U.S.C. § 1321(o)(2) (amended by OPA 90 adding to the end of the provision "or with respect to any removal activities related to such discharge."). Similar provisions were placed in the Deepwater Port Act (33 U.S.C. § 1517(k)(1)(1988)), the

Outer Continental Shelf Lands Act, (43 U.S.C. § 1820(c) (1988)), and the TransAlaska Pipeline Authorization Act, (43 U.S.C. § 1653(c)(9)(1988)).[25] Moreover, section 1018's language is closely tracked by the savings provision of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). 42 U.S.C. § 9614(a).

Intertanko argued at both the district court and court of appeals level that section 1018 had an important, but limited purpose that could readily be discerned from its language, its history and the structure of the legislation in which it arose. Section 1018 by its bare language and history is intended to preserve pre-existing state, local and federal authority to impose fines, penalties or liability for discharges and removal of oil. It does not use the word "prevention," a term important to the Court of Appeals' conclusion, but which it borrowed from Title IV of OPA 90. Similar language existed for many years prior to OPA 90 in other federal statutes without there ever having been any recorded awareness of Congress or the federal courts that the predecessor provisions might permit state regulation of on-board activity of vessels. (Rec., Brief for Appellant Intertanko at 52-76.)

As noted in the "Statement of the Case" section of this Petition, the Oil Pollution Act was intended, *inter alia*, to consolidate the various provisions affecting liability, compensation, and response. (*See supra* pp. 5-6.) The similarity of the language in section 1018 to earlier provisions is clear evidence of this intent. In all the litigation and exchange of briefs in this matter to date no party has yet cited any contemporaneous Congressional indication that the language of section 1018 or similar provisions was intended to diminish the traditional exclusive powers of the federal government over on-board vessel requirements. While acknowledging the limitations of reference to subsequent Congressional statements when interpreting federal

25. In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), the Court found that federal law (the Water Quality Improvement Act of 1970) did not foreclose Florida liability provisions that applied to both facilities within that state and vessels calling at those facilities.

statutory meaning, Intertanko has brought to the attention of the courts below several indications by more recent Congresses that they continue to consider the federal role in matters affecting vessel operations and other PWSA Title II subject matters to be controlling. For example, in 1996, a committee report accompanying the Coast Guard Authorization Act read as follows:

> Authority to make such regulations ["requirements pertaining to vessel structure, design, equipment, and operation"] are [sic] vested in the Secretary of Transportation under sections 3306 and 3307 of title 46, United States Code. Federal unifo.mity in these matters is critical to maintain interstate and international commerce, and because the absence of uniformity hinders the United States' ability to seek increased international vessel standards to better protect the environment.

(Pet. App. G at 268a (citations omitted).)

Although this petition focuses on what Intertanko perceives to be the overarching element of error in the Court of Appeals decision from which all damage to the federal marine safety and environmental protection standards flows, the Court's dismissal of the import of international agreements creates additional grounds for review. The Court of Appeals simply did not give appropriate weight to the impact of the challenged State BAP regulations on international agreements and the role of the United States as a signatory and participant in their negotiation. Treaties to which the United States has acceded are of no lesser rank for Supremacy Clause purposes than are other federal enactments. U.S. Const. Art. VI, cl. 2. States have no power to override these commitments. *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

The Court of Appeals dismissed the concerns of the United States about the effects of state action on the UNCLOS and the U.S./ Canadian Bilateral Agreement on the grounds that they had not been raised below. This statement was factually incorrect and, in any event, does not diminish the national interest in protecting these agreements against unilateral abrogation by state and local governments. Just as

Ray recognized that under the Supremacy Clause a state could not substitute its judgment that a vessel is safe to navigate U.S. waters for that of the United States, *see Ray*, 435 U.S. at 171-174, a state may not bar for non-compliance with local safety and environmental protection standards vessels that have in all respects met requirements agreed upon by the United States and its trading partners. The damage that such state discretion can have to the credibility of the United States as a treaty partner is obvious. However, the Court of Appeals invoked *Chevron v. Hammond* to conclude that "international agreements set only minimum standards. . . ." (Pet. App. A at 23a (citing *Chevron*, 726 F.2d at 493-494).) The Court further stated that section 1018 buttresses *Chevron*'s restrictive view of the need for international uniformity. (Pet. App. A 23a.) At issue in *Chevron* were ballast water discharge requirements. The subject matters of the international agreements relied on by both Intertanko and the United States as sources of preemption in this case are not the ballast discharge issues addressed in *Chevron*. Moreover, the United States has continued to act in the international arena even after the enactment of OPA 90 to promote through diplomatic initiatives international standards intended to increase overall levels of marine safety and environmental protection. The Court of Appeals' view that such agreements constitute only "minimum standards" under *Chevron* and its holding that section 1018 permits unilateral state judgments about whether such agreements apply in particular Ninth Circuit jurisdictions, severely degrade the ability of the United States and other maritime nations from reaching future agreement on international standards.

CONCLUSION

Wherefore, petitioner Intertanko respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review its August 31, 1998 order and amended opinion in this matter.

Respectfully submitted,

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